IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY.

JOHN A. DAILY,
1138 Six Penn Center Plaza,
Philadelphia, PA 19104
Counsel for Petitioners.

March 6, 1979

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, Et Al.,

Petitioners,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents,

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONERS' REPLY.

STATEMENT.

In this instance, the Interstate Commerce Commission directed the railroads collecting demurrage to divide demurrage revenues with the car owner, railroad or private. Both the federal respondents and the intervening railroads in opposition seek to defend the agency's action with the suggestion that freight car ownership and utilization will improve.

It is beyond cavil that a consignee may hold a freight car on demurrage so long as he is willing to pay the published charges. The proposed remittitur, however, makes no change in the published charges, and it is obviously a

matter of supreme indifference to the consignee as to whom he will pay the same money.

Similarly, while two railroads support the Commission's proposal, 37 Class I railroads and the American Short Line Association (No. 78-1049) oppose it. Included in the list of petitioners, moreover, are large railroads which would reap a significant financial benefit if the Commission's proposal were to take effect. This fact alone should give the Court pause for thought.

On three well-defined issues of law, moreover, the Commission has misinterpreted and/or exceeded its authority, and the lower Court erred in sustaining the agency's proposal. The briefs of the federal respondents and the two railroads intervening in opposition to the petition only confirm the necessity for careful scrutiny of the subject by this Court.

THE ISSUES.

1. Whether Authority to "Compute" Demurrage Charges Includes Authority to "Divide" Those Revenues Between Railroads and/or Shipper Car Owners.

To "compute," as defined in Webster's New Twentieth Century Dictionary" (1964), means to "calculate, appraise, estimate, reckon, count, value or rate." The same source defines "divide" as to "part, sever, distribute, share or partition."

Obviously, the Commission "divided," rather than "computed." But the federal respondents here—and the lower Court—evade this question with the suggestion that Section 1(6) also authorizes the agency to establish "rules and regulations relating to such charges." Such rules and regulations, however, are plainly limited to *computations*, not *divisions*.

The federal respondents do not address the problem of divisions. In contrast, the intervening railroads contend that Section 15(6)(a) applies only to joint rates reached by agreement (p. 8). But the only authority granted the agency to "divide" revenues lies under former Section 15(6)(a). The opposition cannot have it both ways. If the Commission simply "computes," it may do so without reference to 15(6). When it "divides" revenues, as it indisputably proposes here, demurrage revenues must necessarily be accepted as *joint* rates or charges of one kind or another, and the Commission is thereby bound to decide the appropriate division under the principles set forth in 15(6)(a). Other agency devices of the same nature designed to re-align revenue divisions between carriers without reference to 15(6)(a) have been uniformly set aside. See, for example, *Aberdeen & Rockfish R. Co. v. United States*, 565 F.2d 327, 335 (C.A. 5, 1977).

2. Whether the Commission's Proposal Authorizes Rebates Prohibited by Sections 15(15) of the Interstate Commerce Act and 41(1) of the Elkins Act.

The opposition alleges that the collecting carrier may remit to private shippers all or any part of the demurrage revenues accrued without violating the Act because demurrage is neither a "rate" nor a "charge" (Fed., p. 8).* If demurrage is actually neither, there should be no obligation upon the carrier to collect it in the first place. But the Commission's Tariff Circular 20 provides that:

> "Each carrier or its agent shall publish, post, and file tariffs which shall contain in clear, plain, and specific form and terms all the rules governing *rates and charges* for *demurrage*, switching and floating . . . which *in any way* increase or decrease the value of service to the shipper."

---

* Brief of Federal respondents.

The reference to an "increase or decrease in value" is clearly patterned on the Elkins Act, which forbids any departure from published tariff rates "by any device *whatsoever.*"

Demurrage charges, accordingly, are published in the same manner as any other railroad rate or charge. And, contrary to the statement of the federal respondents (p. 8), the Commission does not "establish" demurrage charges. Rather, they accept—and either approve or disapprove—of railroad proposals to "re-compute" demurrage charges. Such "re-computation" by the railroads—through published tariffs—was suspended and thereafter approved by the Commission in *Demurrage Rules And Charges, Nationwide*, 340 I.C.C. 83 (1971). Another such re-computation of demurrage charges by the railroads was only recently approved by the Commission in Suspension Board No. 68867) (Fed., p. 3).

Summarizing, the petitioners, by the Act and by Commission edict, are required to publish demurrage charges in the same tariffs which contain their other rates and charges. They are expressly forbidden to accomplish rebates (collection of anything less than the published rate) by "any device whatsoever."

The federal respondents (pp. 7-9) then suggest that since demurrage charges are neither "rates" nor "charges" as those terms are referred to in the Act, there could be no forbidden discrimination if any portion of such charges were returned to the private shipper owner.* However, if Shipper A pays the published rate from X to Z, using railroad cars, and Shipper B pays the same rate using B's own cars, B will receive not only the tariff benefits of its own cars (via a lower published rate or a published allowance), B will receive, in addition, a remittitur of demurrage charges over and above any published tariff

* Duval, p. 3, admits that the collecting railroad must *retain* such charges.

allowance. To that extent, B is preferred over A in clear violation of 49(15)(15)(a) and (41)(1).

Accordingly, if the railroads, pursuant to (15)(15)(a) and (41)(1) are required to assess and collect their published demurrage charges, any remittitur becomes a prohibited "device" resulting in rebate to the favored shipper.

3. Whether the Lower Court Erred in Refusing to Enforce the Time Limitation Enacted by the Congress.

There is no question but that the agency proceeding was a "formal investigation" and that the Commission did not conclude the matter until more than one year after the April 1, 1976 enactment date of the 4R Act. The Commission's action thereby clearly violated the time limits set forth in former Section 17(14)(b), but the Court declined to enforce the will of the Congress because of the "vast resources" expended during the proceeding.

The Congress, of course, had every reason to expect that the Commission would observe the statutory time limits and that the courts would enforce them. The Congress, moreover, would surely be aware that substantial "resources" would be expended in any investigation which was already three years old at the enactment of 4R. Finally, the Congress subsequently eliminated 17(14)(b) in the belief that it had been "executed." Obviously, it had not. The lower Court's action has clearly thwarted the clear intent of the Congress, and this Court should rectify that error.

Respectfully submitted,

JOHN A. DAILY,
1138 Six Penn Center Plaza,
Philadelphia, PA 19104
Counsel for Petitioners.

see
78
1049